

Supreme Court U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-537

REV. PAUL A. McDANIEL, CITIZENS FOR COURT
MODERNIZATION, INC., AND JOHN S. GANNON,

Petitioners,

v.

SELMA CASH PATY, ET. AL.,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF TENNESSEE**

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1979

NO. _____

REV. PAUL A. McDANIEL, CITIZENS FOR
COURT MODERNIZATION, INC., and
JOHN S. GANNON,

Petitioners,

vs.

SELMA CASH PATY, ET. AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF TENNESSEE

Petitioners seek a writ of certiorari to review the judgments of the Tennessee Courts of Appeals in two cases which raise closely related questions of federal law.¹

¹ This single petition is submitted pursuant to Sup. Ct. R. 23(5) and with the prior approval of Supreme Court Clerk Michael Rodak. Francis Lorson to Fred LeClercq, September 18, 1979 (telephone). The two cases for which this petition is filed were decided by "the same court." Sup. Ct. R. 23 (5). The Tennessee Court of Appeals is one court composed of nine judges. TENN. CODE ANN. §16-401. The Court of Appeals

OPINIONS BELOW

The opinion of the Court of Appeals of Tennessee for the Middle Section at Nashville in *Citizens for Court Modernization, Inc., et. al., v. Blanton, et. al.*, was entered March 30, 1979, and is not yet reported. See Appendix A. The Tennessee Supreme Court denied the petition for the writ of certiorari on July 2, 1979. See Appendix B.

The opinion of the Court of Appeals of the Western Section sitting at Knoxville in *McDaniel v. Paty* was entered July 3, 1979, and is not yet reported. See Appendix C. On September 11, 1979, the Tennessee Supreme Court denied petitioner McDaniel's application for permission to appeal taken pursuant to TENN. R. APP. P. 11. See Appendix D.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3), in that rights and privileges are claimed under statutes of the United States.

QUESTIONS PRESENTED

Whether state courts are required to entertain claims arising under 42 U.S.C. § 1983.

Whether state courts are required to make awards of attorney fees where appropriate under 42 U.S.C. §§ 1988 and 1973l(e).

... is authorized and empowered to sit in sections of three (3) judges each, at Knoxville, Nashville and Jackson, to hear and determine cases just as though all nine members were present and participating, and the presiding judge of the Court of Appeals shall in such event have the right from time to time, to assign and reassign the judges and sections. TENN. CODE ANN. § 16-413.

Whether the Tennessee Court of Appeals erred in failing to remand both cases for an award of fees in accordance with relevant federal standards.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983. *Civil action for deprivation of rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity or other proper proceedings for redress.

42 U.S.C. § 1988, *as amended*, 42 U.S.C.A. § 1988 (Supp. 1978). *Proceedings in vindication of civil rights.* . . . In any action or proceeding to enforce a provision of section . . . 1983 . . . the court may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1973, *as amended*, 42 U.S.C.A. 1973l(e) (Supp. 1978). *Attorney's fees.* In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

TENN. CONST. Art IX, § 1.

"Ineligibility of ministers and priests to seats in legislature. —Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Ministers of the Gospel, or

priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature".

TENN. PUB. ACTS, Ch. 848, § 4 (1976).

"Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five (25) names of legally qualified voters of his or her representative district. Each district must be represented by a qualified voter of that district. In the case of a candidate from a representative district comprising more than one county, only one qualifying petition need be filed by the candidate, and that in his home county, with a certified copy thereof filed with the Election Commission of the other counties of his representative district".

TENN. CODE ANN. § 2-1932.

Corporate funds — Improper use in election. It shall be unlawful for the executive officers or other representatives of any corporation doing business within this state, to use any of the funds, moneys, or credits of the corporation for the purpose of aiding either in the election or defeat in any primary or final election, of any candidate for office, national, state, county, or municipal, or for the purpose of aiding in the success or defeat of any proposition submitted to a vote of the people, or in any way contributing to the campaign fund of any political party, for any purpose whatever.

TENN. CODE ANN. § 2-1933.

Penalty for improper use of corporate funds. Every executive officer, agent, or other representative of any corporation, doing business within this state, who shall

knowingly consent to, approve, or aid in the use of the funds of a corporation, for any of the purposes mentioned in § 2-1932 shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than five hundred dollars (\$500) nor more than two thousand dollars (\$2,000), and shall be imprisoned in the county jail or workhouse not less than two (2) nor more than six (6) months.

STATEMENT OF THE CASE

Following this Court's judgment in *McDaniel v. Paty*, 435 U.S. 616 (1978), Petitioner McDaniel applied in the Chancery Court of Hamilton County for an award of reasonable attorney fees under 42 U.S.C. §§ 1988 and 1973l(e). After a hearing, the Chancery Court awarded Petitioner McDaniel fifteen thousand dollars in attorney fees. Appendix E. The Attorney General of Tennessee appealed the award of fees contending that Tennessee courts lack jurisdiction over claims arising under 42 U.S.C. § 1983 and that Tennessee courts are not obliged to make fee awards under 42 U.S.C. §§ 1988 and 1973l(e).

Petitioner McDaniel cross-appealed contending that the Chancery Court award was inadequate in view of the time and expenses of counsel and other relevant federal standards for determining the amount of fees.

The Court of Appeals for the Western Section sitting at Knoxville reversed the Hamilton County Chancery Court, overruled the award of \$15,000 in attorney fees and adjudged costs against Petitioner Paul McDaniel. The Court of Appeals held that Petitioner McDaniel cannot rely on 42 U.S.C. § 1973l(e) "because only one of the Justices of the Supreme Court of the United States,

Mr. Justice White, alludes to voting rights as being infringed upon." Appendix C at 25.

The Court of Appeals held that Tennessee courts are without jurisdiction over claims arising under 42 U.S.C. §§ 1983 and 1988 upon the authority of *Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W. 2d 248 (1969).

In *Citizens for Court Modernization, Inc., et.al. v. Blanton, et.al.*, petitioner corporation filed suit on February 21, 1978 in the Chancery Court of Davidson County, Tennessee for relief against the enforcement of TENN. CODE ANN. §§ 2-1932-33 alleging that "plaintiff, plaintiff's president, Jack Gannon, and plaintiff's executive officers and members have been deprived of their fundamental rights of speech, association and voting secured by the First and Fourteenth Amendments of the United States Constitution and further protected by 42 U.S.C. § 1983." Complaint at par. 12. Petitioner corporation requested both declaratory and injunctive relief and, if it prevailed, reasonable attorney fees as provided by 42 U.S.C. §§ 1988 and 19731(e).

Pursuant to TENN. R. CIV. P. 24.01(2), John S. Gannon, president of petitioner corporation, moved to intervene.

On March 2, 1978, after a hearing, the Chancery Court entered an interlocutory order awarding the relief sought by petitioner but disallowing the claim for reasonable attorney fees. On July 10, 1978, following this Court's decisions in *Hutto v. Finney*, 437 U.S. 678 (1978), and *First National Bank v. Bellotti*, 435 U.S. 765 (1978), petitioners moved that the Chancery Court reconsider its denial of attorney fees to petitioners.

On August 4, 1978, petitioners motion was denied and a final judgment was entered August 28, 1978. The Chancery Court incorporated the declaratory relief entered on March 2, 1978 into its final judgment, denied the motion of Petitioner Gannon to intervene² and denied an award of attorney fees.

On appeal, the Court of Appeals affirmed the chancery Court upon the authority of *Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W. 2d 248 (1969), and upon the ground that an award of fees under 42 U.S.C. § 1988 "are strictly within the discretion of the trial court." Appendix A at 20.

REASONS FOR GRANTING THE WRIT

1. THE DECISIONS BELOW ARE INCONSISTENT WITH A PROPER INTERPRETATION OF 28 U.S.C. §§ 1983, 1988, 19731(e).

Recent dictum suggests that state courts have concurrent jurisdiction over claims arising under 42 U.S.C. § 1983. *Aldinger v. Howard*, 427 U.S. 1, 18 (Rhenquist, J., joined by Burger, C.J., and Stewart, White, Powell and Stevens, J.J.); 36n.17 (Brennan, J., joined by Marshall and Blackmun, J.J., dissenting) (1976). See also *Chapman v. Houston Welfare Rights Organization*, ___ U.S. ___, 99 S.Ct. 1905 (1979). Mr. Justice White

² The Tennessee Court of Appeals mistakenly stated that "plaintiff has not pursued the appeal on the 'Motion to Intervene and Complaint,'" Appendix A at 17. The Davidson County Chancery Court order of March 2, 1979 granted "an appeal to the Court of Appeals on the denial of the right of John S. Gannon to intervene, and any attorney fees,..." The name of petitioner Gannon was referenced in all pleadings including the "Bill of Exceptions," "Brief of Appellant" and "Short Statement of the Case" in the Court of Appeals and the "Petition for Certiorari" in the Supreme Court. Petitioners assigned as error in the Court of Appeals that the "Davidson County Chancery Court erred in its denial of reasonable attorney fees to plaintiffs ..." (emphasis added). Petitioner Gannon has standing in this

observed only last term in *Chapman* that "since 1911, there have been some § 1983 suits not cognizable in district court at all unless they involve the requisite jurisdictional amount under general federal question jurisdiction." 99 S.Ct. at 1943.

At the very least, the Supremacy Clause would appear to preclude state courts from *discriminating* against claims arising under § 1983 as the Tennessee Courts have discriminated against petitioners' claims. Cf. *Sullivan v. Little Hunting Park*, 396 U.S. 229, 238 (1969); *Dice v. Akron, C. & Y.R.R.*, 342 U.S. 359 (1952); *Testa v. Katt*, 330 U.S. 386 (1947); *Grubb v. Public Utilities Comm.*, 281 U.S. 470 (1930); *General Oil v. Crain*, 209 U.S. 211 (1908); *Mondou v. New York, NH & HR Co.*, 233 U.S. 1 (1876); *Claflin v. Houseman*, 93 U.S. 130, 133-36 (1876).

The Tennessee courts *alone* among the state courts have questioned concurrent jurisdiction of state courts over § 1983 claims. See *Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969), *Citizens for Court Modernization, Inc., et.al. v. Blanton, et.al.* (Appendix A), and *McDaniel v. Paty* (Appendix C).

The legislative history of the 1976 Act, although not free from ambiguity, suggests that the Congress intended attorney fees to be available to prevailing parties asserting § 1983 claims in the state courts. The 1976 Act was intended

. . . to authorize the award of a reasonable attorney's fee in actions brought in *State* or federal courts, under certain civil rights statutes. . . . 122 CONG. REC. H 12159 (Oct. 1, 1976) (Mr. Drinan of Massachusetts) (emphasis added).

case through his intervention and perfected appeals in the courts below, and, along with other officers and members of the petitioner corporation, as a third party whose rights were asserted by the petitioner corporation. See Complaint filed Feb. 21, 1978 at par. 12 and *NAACP v. Alabama*, 357 U.S. 449 (1958).

Cf. *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359 (1952). Disallowance of state jurisdiction would undermine the effective assertion of § 1983 claims in cases such as *McDaniel*. Petitioner *McDaniel's* § 1983 claim was *not* removable to the federal court under 28 U.S.C. § 1441 because it was asserted as a defense and did not arise on the "face of the complaint." See *Gully v. First National Bank of Meridian*, 299 U.S. 109, 113 (1936).

The Tennessee Court of Appeals in *Citizens for Court Modernization*, Appendix A at 19-21, has obviously misinterpreted the scope of judicial discretion with respect to awards of fees under 42 U.S.C. §§ 1988 and 19731(e). See S. Judiciary Comm., S.Rep. No. 94-1011, 94th Cong. 2nd Sess. (1976), and H.R. Judiciary Comm., H.R. Rep. No. 94-1558, 94th Cong., 2nd Sess. (1976).

The importance of the legislative history in the interpretation of the Civil Rights Attorney's Fee Awards Act of 1976 has been well established. *Hutto v. Finney, supra*, 437 U.S. at 700.

2. THE DECISIONS BELOW DENY ACCESS TO STATE COURTS BY PERSONS ASSERTING FEDERAL CIVIL RIGHTS CLAIMS AND UNDERMINE IMPORTANT POLICIES OF FEDERALISM.

Assuring plaintiffs a choice of forum in civil rights actions between state and federal courts enhances the effectiveness of the vindication of federally secured rights, a substantial, if not compelling, interest deserving protection of this Court. For reasons of cost, convenience or sympathetic vindication of federal rights, persons asserting claims under 42 U.S.C. § 1983 may sometimes prefer to file in state rather than federal courts. Because § 1983 constitutional claims are often interwoven with unresolved

questions of state law, the filing of such claims in state court spares federal judges the difficulty of having to resolve questions of state law which can definitively be resolved only by state courts. State court filing avoids the protracted delays and excessive expenses which inevitably follow in the wake of abstention. Moreover, when the erstwhile federal plaintiff is remitted to the state courts for resolution of unclear questions of state law, the plaintiff may choose for reasons of convenience and economy to assert his federal, as well as his state claims, in the state court. See *NAACP v. Button*, 371 U.S. 415 (1963).

While most § 1983 claims are filed in federal court, § 1983 claims are sometimes filed in state courts, and state courts have generally accepted jurisdiction over such claims. See *Jones v. Banner Moving and Storage, Inc.*, 358 N.Y.S.2d 885, *aff'd. in part, mod. in part*, 369 N.Y.S.2d 804, 48 A.D.2d 928, 78 Misc. 2d 762 (1974); *Holt v. City of Troy*, 355 N.Y.S.2d 94 (1974); *Parry v. Apache Junction School District*, 20 Ariz. App. 561, 514 P.2d 514 (1973); *Albert v. Daniel*, 25 Ill. App.3d 291, 323 N.E.2d 110 (1974); *Travel Agents Malpractice Action Corps. v. Regal Cultural Society, Inc.*, 118 N.J. Super. 184, 287 A.2d 4 (1972); *Vogt v. Nelson*, 69 Wis. 2d 125, 230 N.E.2d 123 (1975); *Williams v. Horvath*, 129 Cal. Rep., 453, 548 P.2d 1125 (1976); *Brown v. Pitchess*, 119 Cal. Rep. 204, 531 P.2d 772 (1975); *McClanahan v. Cochise College*, 25 Ariz. App. 13, 540 P.2d 744 (1975); *New Times, Inc. v. Ariz. Board of Regents*, 20 Ariz. App. 442, 513 P.2d 960 (1973); *Vason v. Carrano*, 31 Conn. Sup. 338, 330 A.2d 98 (1974); *Anderson v. East Street Theatre Corp.*, 63 A.2d 649 (M.C.A.D.C. 1943).

There are few reported state court cases involving claims for attorney fees under 42 U.S.C. § 1988. However, such claims have been recognized in some states. See *Board of Trustees, et.al. v. Holso*, 584 P.2d 1009 (Wyo. 1978). See also *Tobeluk v. Lind*, 589 P.2d 873, 881 (Alas. 1979) (Rabinowitz, J., joined by Boochever, C.J., dissenting in part). Attorney fees under §1988 were also awarded in *Ferdinand v. City of Fairbanks*, 11 CLEARING HOUSE REV. 661 (Alaska Super. Ct. 1977) (unreported) and *Druck v. Cory*, 11 CLEARINGHOUSE REV. 269 (Alaska Super. Ct. 1977) (unreported). Other state courts have recognized an obligation to award fees under 42 U.S.C. § 1988 either expressly or by implication but have denied fees because the plaintiff was unsuccessful. See *Kettlewell v. Hot-Mix, Inc.*, 566 S.W.2d 663, 668 (Texas Ct. Civ. App. 1st Dist. 1978); *Tobeluk v. Lind*, *supra* 589 P.2d at 879-81 (Alas. 1979); *Ashley v. Curtis*, 408 N.Y.S. 2d 858, 861-863 (Sup. Ct., Stuben Co., 1978). Cf. *Gayton v. Shanq*, 400 N.Y.S.2d 1016 (Sup. Ct. Cattaragus Co. 1978). But see *Young v. Toia*, 403 N.Y.S. 2d 390, 394 (Sup. Ct. Orleans Co. 1977).

Vindication of § 1983 claims in state courts also reduces the heavy docket pressures in the federal courts and enables state courts to bear a fairer share of the burgeoning civil rights litigation. Moreover, state sensibilities are not as apt to be aroused by vindication of federal claims by state courts.

The substantive relief afforded petitioner Citizens for Court Modernization, Inc., by the Davidson County Chancery Court plainly justified plaintiff's choice of forum. But both the Davidson County Chancery Court and the Tennessee Court of Appeals felt constrained to abide by the *Chamberlain* doctrine and the Tennessee Supreme Court was unwill-

ing in *Citizens for Court Modernization* or in *McDaniel* to review and repudiate the misconception of federal law in *Chamberlain*.

3. THIS PETITION RAISES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, AUTHORITATIVELY RESOLVED BY THIS COURT.

This petition for certiorari should be granted because it raises important questions of federal policy never before decided by this Court concerning the right of access of federal civil rights claimants to state courts. The *Chamberlain* doctrine which compelled the decisions of the Tennessee Court of Appeals deserves to be re-examined in the light of recent Supreme Court cases canvassing the history and purposes of § 1983. The award of fees by the Hamilton County Chancery Court, Appendix E, likewise deserves reconsideration in the light of controlling federal standards established in the Senate and House Committee Reports on the 1976 Civil Rights Attorney Fees Awards Act.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgments and opinions of the Tennessee Courts of Appeals.

Respectfully submitted,

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September 20, 1979

APPENDIX A

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

CITIZENS FOR COURT MODERNIZATION, INC.,
Plaintiff-Appellant

vs.

RAY BLANTON, Governor of Tennessee; BROOKS
McLEMORE, Attorney General of Tennessee; THOMAS
H. SHRIVER, Davidson County District Attorney,
Defendants-Appellees

DAVIDSON EQUITY

APPEALED FROM THE SEVENTH CHANCERY DIVISION,
PART I, FOR DAVIDSON COUNTY, TENNESSEE

HONORABLE BEN H. CANTRELL, CHANCELLOR

FILED: MAR 30 1979

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Appendix A

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ATTORNEYS FOR DEFENDANTS-APPELLEES

AFFIRMED

SAMUEL L. LEWIS
JUDGE

[2]

CITIZENS FOR COURT MODERNIZATION, INC.,
Plaintiff-Appellant

vs.

RAY BLANTON,
Governor of Tennessee,
BROOKS McLEMORE,
Attorney General of Tennessee
THOMAS H. SHRIVER,
Davidson County District Attorney

Defendants-Appellees

DAVIDSON EQUITY

OPINION

Plaintiff filed suit in the Chancery Court for Davidson County, pursuant to T.C.A. § 23-1102, seeking a declaratory judgment as to whether provisions of T.C.A. §§ 2-1932 and 2-1933 would prohibit plaintiff from soliciting the views of its members as to whether it should take any stand on the judicial article recommended by the 1977 Constitutional Convention for adoption by the people of Tennessee in the referendum held on March 7, 1978. Plaintiff alleged that it had a right under the first and fourteenth amendments to the Constitution of the United States to solicit such views.

Defendants, pursuant to Rule 12.02 of the Tennessee Rules of Civil Procedure, moved the Court to dismiss the plaintiff's action for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Plaintiff moved for summary judgment on the ground that there was no genuine issue as to any material fact and that plaintiff was entitled to judgment as a matter of law. Further, John S. Gannon, President of the Plaintiff Corporation, filed a "Motion to Intervene and Complaint."

Prior to the hearing the parties reached an agreement as to settlement on certain paragraphs in plaintiff's complaint.

[2]

The Chancellor, in his Order of February 24, 1978, held that the plaintiff is constitutionally protected in its right to use corporate funds to poll its members on whether they favor or oppose the proposed judicial article, that

plaintiff's right to use corporate funds to solicit its members to assent for their dues or other voluntary contributions to be used for the purpose of aiding in the success or defeat of a candidate or proposition submitted to a vote of the people in this or future elections is constitutionally protected; that the right of officers and members of plaintiff corporation to use the proceeds of its separate political fund of voluntary contributions or earmarked dues of assenting members for any lawful political purposes is constitutionally protected; that no prosecution may lawfully be brought against plaintiff under T.C.A. §§ 2-1932 and 2-1933 for engaging in the constitutionally protected activities described above; and that attorney fees are not a proper award in this case.

Plaintiff then moved for a reconsideration of the denial of reasonable attorney fees. The Chancellor denied the motion and judgment was rendered accordingly.

Plaintiff appealed on the denial of the "Motion to Intervene and Complaint" and on the issue of attorney fees. the plaintiff has not pursued the appeal on the "Motion to Intervene and Complaint." The defendants excepted to the action of the Court in finding and holding "that the right of the plaintiff to use corporate funds to poll its members on whether they favor or oppose the Judicial Article in the election of March 7, 1978 is constitutionally protected by the rights of speech, association in [sic] [and] voting secured by 42 U.S.C. § 1983 . . ."

Two questions are raised on appeal:

1. Do the courts of this State have concurrent jurisdiction with the Federal Courts of claims arising under 42 U.S.C. § 1983?

[3]

2. Are State courts compelled to award attorney fees in cases where such awards are appropriate under 42 U.S.C. §§ 1983 and 19731(e)?

While other jurisdictions have consistently held that state courts have concurrent jurisdiction over 42 U.S.C. § 1983 actions, see *Long v. District of Columbia*, 469 F.2d 927 (D.C. Cir. 1972); *Houston v. Moore*, 18 U.S. (5 Wheat.) 125-27, 5 L.Ed. 19; *Kish v. Wright*, 562 P.2d 625 (Utah 1977); *Ammlung v. City of Chester*, 355 F. Supp. 13 (D.C. Penn. 1973), affd. 494 F.2d 833 (3rd Cir. 1974), our Supreme Court, in *Chamberlin [sic] v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969), has held to the contrary.

In *Chamberlin [sic]*, the Court of Appeals had held that there was no basic policy consideration which would prevent a state court from trying a tort action predicated on the federal civil rights laws (42 U.S.C.A. §§ 1983 and 1985(3)) where the plaintiff is willing to have the state court do so and selects the forum.

On appeal, Mr. Justice Creson, speaking for the Court, said:

[1] To the contrary, after considering the Congressional Records pertinent to this legislation which disclose its historical background, the temper of the times and climate of opinion held and expressed in this regard, we are firmly convinced that there is abundant indication that these statutes creating this action were directed to the federal trial forum, not the respective states. In any event, no policy of this State can be found in its history, judicial or otherwise,

that would require the judicial branch of the government of Tennessee to entertain such action. *Id.* at ___, 442 S.W.2d at 250.

He went on to set out the legislative history of the act in detail and then:

In view of the historical examination given R.S. §1979 [42 U.S.C.A. §§ 1983, 1985(3)] by the United States Supreme Court, and in the light of the interpretation given that section, it would be illogical indeed to hold that a State court should enforce, or is required to enforce an alleged cause of action which owes its very existence to congressional recognition of reluctance or refusal of State courts to act. *Id.* at ___, 442 S.W.2d at 252.

[4]

Chamberlin [sic] is the law enunciated by our Supreme Court, and the trial courts and this court are bound to follow that law until such time as the Supreme Court or the Legislature changes it.

In any event, the plaintiff here has obtained the basic relief that it desired, i.e., a legal determination of the declaratory judgment act that it could use its corporate funds to solicit its members to determine whether they wanted to take any stand on the proposed judicial article being submitted to the people for consideration in a referendum without running the risk of violating T.C.A. §§ 2-1932 and 2-1933.

As to the second issue, even if the Chancellor had taken jurisdiction and "vindicated rights secured by 42 U.S.C. § 1983," plaintiff would not have automatically been entitled to reasonable attorney fees. The federal statutes

relied upon by plaintiff state that the award of attorney fees are strictly within the discretion of the trial court. See

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to

[5]

enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, *the court, in its discretion, may allow the prevailing party, other than the*

United States, *a reasonable attorney's fee as part of the costs.* (emphasis added). As amended Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641.

and

§ 19731. Enforcement proceedings

Attorney's fees

(e) In any action or proceeding to enforce the voting guarantee of the fourteenth or fifteenth amendment, *the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.* (emphasis added). As amended Pub.L. 94-73, Title II, § 207, Title IV, § 402, August 6, 1975, 89 Stat. 402, 404.

Thus, 42 U.S.C. §§ 1988 and 19731(e) are not authority for a mandatory award of attorney fees.

The awarding of attorney fees is a matter generally within the discretion of the trial court.

In *Riley v. Riley*, 9 Tenn. App. 643 (1929), this court stated:

The rule in Tennessee on the question of allowance of attorney's fees by the nisi pruis courts is that the allowance made will not be interfered with by appellate courts, unless some injustice has been perpetrated, such matters being largely within the discretion of the lower courts. *Bank v. Wood*, 125 Tenn. 6; *Bank v. Buckingham*, 144 Tenn. 344. *Id.* at 644.

In *Bank v. Wood*, 125 Tenn. 6, 140 S.W. 31 (1911), our Supreme Court stated:

Appendix A

We are not disposed to interfere with the allowance of attorneys' fees in the lower court, unless we can see that some injustice has been perpetrated. Such matters are to a great extent within the discretion of the court, and we will not interfere with the exercise of that discretion unless we think that allowance is materially wrong. *Id.* at 17, 140 S.W. at 34.

We have reviewed the record in this proceeding and examined in depth the arguments of counsel at trial concerning the question

[6]

of attorney fees. The record reveals no error in the exercise of discretion on the part of the Chancellor.

The judgment of the Chancellor is affirmed with costs to be paid by the plaintiff.

/s/ SAMUEL L. LEWIS
SAMUEL L. LEWIS, JUDGE

SHRIVER, P.M., Concur
TODD, J., Concur.

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

CITIZENS FOR COURT)	
MODERNIZATION, INC., et al.,)	
<i>Petitioners</i>)	
)	DAVIDSON EQUITY
RAY BLANTON, GOVERNOR, et al.,)	
<i>Respondent</i>)	

FILED: JUL 2 1979

IN RE: PETITION FOR WRIT OF CERTIORARI OF
CITIZENS FOR COURT MODERNIZATION,
INC., et al.

Upon consideration of the petition and brief in support thereof of Citizens For Court Modernization, Inc., et al., the reply brief of Ray Blanton, Governor, et al., the opinion of the Court of Appeals and the record in the cause,

The writ is denied with concurrence in results only at the cost of petitioners.

PER CURIAM

APPENDIX C

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION SITTING AT KNOXVILLE

SELMA CASH PATY, ET AL.,)
 Appellant,)
) Hamilton Equity
) Honorable Howell N. Peoples
) Chancellor
 REV. PAUL A. McDANIEL,)
 Appellee-Appellant.)

FILED; JUL 3 1979

Kenneth R. Herrell, Assist. Atty Gen. for the State,
William M. Leech, Jr., Attorney General of counsel.

Frederic S. LeClercq of Knoxville for McDaniel.

REVERSED, DISMISSED

Opinion filed:

MATHERNE, J.

Having successfully defended a lawsuit which challenged his right to be elected delegate to the 1977 Limited Constitutional Convention for the State of Tennessee,¹ the defendant, Reverend Paul McDaniel, made a motion in the Chancery Court sitting in Hamilton County, Tennessee for an award

¹See *McDaniel v. Paty*, 435 U.S. 618, 55 L. Ed. 2d 593, 98 S. Ct. 1322 (1978) which reversed *Paty v. McDaniel* (Tenn. 1977) 547 S.W.2d 897.

Appendix C

of reasonable attorney's fees as allowed under 42 U.S.C. § 1988. The chancellor granted an award of \$15,000 attorney's fees to Reverend McDaniel. The State of Tennessee appeals that decision. Reverend McDaniel also appeals on the ground that the amount of the award is inadequate.

The *Paty v. McDaniel* lawsuit was filed in the Chancery Court sitting in Hamilton County, Tennessee. Reverend McDaniel filed in that court his "Counter-Complaint, Cross-Complaint and Third-Party Complaint" wherein among other things he alleged "[t]his cause arises under *Tennessee Code Annotated*, Title 23, Chapter 11, and 42 U.S.C. § 1983." Reverend

[2]

McDaniel, in seeking an award of attorney's fees, relies upon 42 U.S.C. § 1988 which provides that "[i]n any action or proceeding to enforce a provision of sections . . . 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as a part of the cost." Reverend McDaniel also relies upon 42 U.S.C. § 1973 1 (e) which provides that "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

We hold that Reverend McDaniel cannot rely upon 42 U.S.C. § 1973 1 (e) because only one of the Justices of the Supreme Court of the United States, Mr. Justice White, alludes to voting rights as being infringed upon. As we understand the remainder of the opinions, the Justices based their decisions upon the First Amendment.

The pivotal issue in determining the propriety of an award of attorney's fees under 42 U.S.C. § 1988 is whether the courts of the State of Tennessee have jurisdiction to entertain a lawsuit based upon 42 U.S.C. § 1983. Admittedly, state courts can assume concurrent jurisdiction of lawsuits arising under that statute. See *New Times, Inc. v. Arizona Board of Regents*, (Ariz. App. 1973) 513 P.2d 960. The Supreme Court of Tennessee has, however, declined to assume state court jurisdiction over claims arising under 42 U.S.C. § 1983, holding jurisdiction to be exclusively federal. *Chamberlain v. Brown*, (Tenn. 1969), 422 S.W. 2d 248. That holding has been followed in *Citizens for Court Modernization, Inc. v. Ray Blanton, Governor, et al.*, Court of Appeals of Tennessee, filed at Nashville, March 30, 1979, wherein it is stated that "*Chamberlain* is the law enunciated by our Supreme Court, and the trial courts and this court are bound to follow that law until such time as the Supreme Court or the Legislature changes it."

In order to challenge the disqualification of ministers to become candidates for delegate to the Tennessee Constitutional Convention, it

[3]

was not necessary for Reverend McDaniel to assert rights under 42 U.S.C. § 1983 in the original lawsuit of *Paty v. McDaniel*. He could have, in his affirmative actions therein pleaded, attacked the infirmities of the Constitution of Tennessee without relying on 42 U.S.C. § 983. As we read the record of that proceeding, that is exactly what happened. Neither the Chancery Court, the Supreme Court of Tennessee, nor the Supreme Court of the United States so much as even refer to that statute. The issue

was plainly and simply a question of whether the Constitution of Tennessee denied ministers of the gospel rights guaranteed them under the First Amendment to the Constitution of the United States. The fact that the state courts of Tennessee took jurisdiction of that issue does not in any manner infer that those courts also assumed jurisdiction of the lawsuit under a 42 U.S.C. § 1983 claim. We, therefore, hold that the Chancery Court sitting in Hamilton County, Tennessee, was without jurisdiction to entertain Reverend McDaniel's motion for an award of attorney's fees under 42 U.S.C. § 1988.

It results that the decree of the chancellor awarding \$15,000 attorney's fee is reversed and the motion for an award of attorney's fee is overruled. The cost of this proceeding in the chancery court and in this Court are adjudged against Reverend McDaniel for which execution may issue, if necessary.

/s/

MATHERNE
MATHERN, J.

/s/ NEARN

NEARN, J. (Concurs)

/s/ SUMMERS

SUMMERS, J. (Concurs)

APPENDIX D

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

SELMA CASH PATY, ET AL.,)	
<i>Appellee</i>)	
)	
<i>vs.</i>)	HAMILTON CHANCERY
)	
REVEREND PAUL McDANIEL,)	
<i>Applicant</i>)	

FILED: SEP 4 1979

ORDER

On considering the application for permission to appeal and briefs filed in this case and the entire record, the application of the Reverend McDaniel is denied with concurrence in results only, at cost of the appellant.

PER CURIAM

APPENDIX E

IN THE CHANCERY COURT FOR
HAMILTON COUNTY, TENNESSEE, PART TWO

NO. 51094

SELMA CASH PATY)
)
VS.)
)
REV. PAUL A. MCDANIEL, ET AL)

FILED DEC 21 1978

MEMORANDUM OPINION

This cause is pending before the Court on the motion of the defendant and counter-plaintiff, Rev. Paul A. McDaniel, for an award of attorney fees pursuant to 42 U.S.C. Sec. 1988.

The moving party was originally sued in this Court by the plaintiff to prevent the election commission of this County from placing the name of Rev. Paul McDaniel on the ballot as a candidate for delegate to the Constitutional Convention of 1977. An Answer and Counter-Complaint was filed alleging that a provision of the Tennessee Constitution, which prohibits "ministers of the gospel" from holding certain public offices, violated the Constitution of the United States and violated rights guaranteed to McDaniel by 42 U.S.C. Sec. 1983. The trial court

concurred with this contention of defendant McDaniel. On appeal, the Tennessee Supreme Court reversed the trial court, and upheld the provision of the Tennessee Constitution barring ministers from holding certain public offices. *Paty vs. McDaniel*, 547 S.W. 2d 897 (1977). Defendant appealed to the U. S. Supreme Court and on April 19, 1978, the decision of the Tennessee Supreme Court was reversed. *McDaniel vs. Paty*, 98 S.Ct. 1322 (1978)

The State of Tennessee now contends that defendant McDaniel should not be permitted to recover attorney fees since Tennessee Courts are not required to entertain actions to enforce rights

[2]

guaranteed by 42 U.S.C. Sec. 1983, citing *Chamberlain vs. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969). That case has no application to the present cause since defendant McDaniel did not initiate this action, but raised the issues of the violation of his rights (pursuant to 42 U.S.C. Sec. 1983) in his Answer and Counter-claim which he was entitled to do under Rule 13 of the Tennessee Rules of Civil Procedure.

The Constitution of the State of Tennessee provides that the Courts of this State shall be open and every man entitled to remedy by due course of law. (Art. 1, Sec. 17) Surely it cannot be questioned today that, as stated by the Court of Appeals in its ruling in *Chamberlain vs. Brown*, *supra*,

State Courts are courts of general jurisdiction and as such, have full jurisdiction to try cases predicated on federal statutes, except in areas where Congress has

expressly limited jurisdiction to federal courts, or where some overriding policy consideration dictates that State court jurisdiction be excluded.

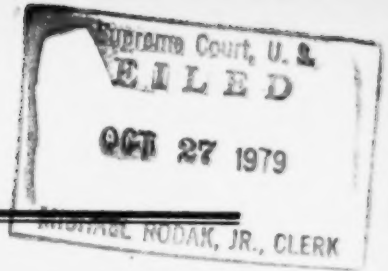
Plaintiff seeks fees and expenses in the amount of \$37,005.93. It was stipulated at the hearing of this motion that the number of hours spent by counsel on this case and the hourly rates charged by counsel were reasonable. It further appears that funds had been raised by public appeal to defray some of the legal fees and expenses leaving a balance requested of \$27,671.83.

In view of the nature of this case, the fact that a landmark decision of the United States Supreme Court resulted, and recognizing that counsel undertook representation in this case for a fee, but also as a *pro bono publico* matter, the Court will require the State of Tennessee to pay to counsel for defendant McDaniel the sum of \$15,000.00.

[3]

Counsel for defendant McDaniel shall submit an appropriate order.

/s/ HOWELL PEOPLES
CHANCELLOR - PART TWO



IN THE
Supreme Court of the United States

OCTOBER TERM 1979

No. 79-537

REV. PAUL A. MCDANIEL, CITIZENS FOR COURT
MODERNIZATION, INC., AND JOHN S. GANNON,

Petitioners,

vs.

SELMA CASH PATY, *et al.*,

Respondents.

**RESPONSE TO PETITION
FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF TENNESSEE**

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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-537

REV. PAUL A. MCDANIEL, CITIZENS FOR COURT
MODERNIZATION, INC., AND JOHN S. GANNON,
Petitioners,

vs.

SELMA CASH PATY, *et al.*,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE

The Respondents make this their response to the Petition For A Writ of Certiorari To The Court of Appeals of Tennessee in this matter now before this Court.

OPINIONS BELOW

The Petitioners have correctly stated that the Court of Appeals of Tennessee has rendered its Opinions on the questions presented in this Petition, and that the Tennessee Supreme Court has denied their Petitions for Certiorari and Discre-

tionary Appeal. The Respondents submit, however, that the opinions have not been published, and in accordance with Rule 31 of the Tennessee Supreme Court, they will not be published. See Appendix A.

JURISDICTION

The Respondents admit that jurisdiction is conferred upon this Court by 28 U.S.C. § 1257(3) inasmuch as rights and privileges are claimed under statutes of the United States.

QUESTION PRESENTED

Are any attorneys fees appropriate under 42 U.S.C. §§ 1988 and 1973 I(e) when there has been no denial of a citizen's rights, privileges or immunities secured by the Constitution of the United States, and as proscribed by 42 U.S.C. § 1983?

TENNESSEE STATUTORY PROVISIONS INVOLVED

Tennessee Code Annotated § 23-1101.

[Definition of person.-] The word "person" wherever used in this chapter, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever.

Tennessee Code Annotated § 23-1102.

[General power of courts.-] Courts of record within their respective jurisdiction shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding

shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

Tennessee Code Annotated § 23-1103.

[Construction of statutes and written instruments.-] Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

STATEMENT OF THE CASES

The case of *McDaniel v. Paty* was originally filed by Selma Cash Paty against the petitioner, the Rev. Paul A. McDaniel, under the provisions of the Tennessee Declaratory Judgment Act, T.C.A. §§ 23-1101, et seq., for a judicial determination as to whether the Rev. McDaniel could lawfully sit as a Delegate to a Limited Constitutional Convention to be held in 1977 if he were elected to the office, in view of Article IX, § 1, of the Constitution of Tennessee. This Article prohibits Ministers of the Gospel from serving as a member of the Tennessee General Assembly, and it was made applicable to Delegates to the Convention by the enabling legislation providing for the Convention. After the trial court found the disqualifications provisions in Article IX, § 1, to be unconstitutional, the Tennessee Supreme Court in *Paty v. McDaniel*, 547 S.W.2d 897 (1977) reversed the trial court, and held that Article IX, § 1, is justified, and, therefore, constitutional.

Upon perfecting his appeal to this Court, the Petitioner was given a stay of the Tennessee Supreme Court's decree of March 16, 1977, by Mr. Justice Stewart on July 6, 1977. The Petitioner, having been previously elected to the office of Delegate to the 1977 Constitutional Convention, then took the prescribed oath of office, and served in the office until the Convention adjourned sine die.

The case of *Citizens for Court Modernization, Inc., et al. v. Blanton, et al.*, was originally filed by the Petitioner *Citizens for Court Modernization, Inc.*, a general welfare corporation, under the provisions of the Tennessee Declaratory Judgment Act, T.C.A. §§ 23-1101, et seq., for a judicial determination as to whether the Petitioner could use its corporate funds to solicit the views of members as to whether the corporation should take a stand, support, or oppose a new judicial article proposed by the 1977 Constitutional Convention which was to be accepted or rejected by the voters of Tennessee in a referendum on March 7, 1978. The trial record of this case shows that the Respondents to this petition conceded, at the hearing on the Complaint that the Petitioner had a constitutional right to solicit the views of its members about taking a stand on the issue being presented to the public in the referendum election without violating any of the provisions of T.C.A. § 2-1932 regarding corporate funds or credits for the purpose of aiding in the success or defeat of any proposition submitted to a vote of the people.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Since there have been no violations of either of the Petitioners' Civil Rights under the Constitution of the United States and as proscribed by 42 U.S.C. 1983, there is no basis for awarding any attorneys' fees under the provisions of 42 U.S.C. §§ 1973 1 (e) and 1988.

1. *McDaniel v. Paty*

In his Petition, the Rev. McDaniel asserts that he was vindicated by this Court's opinion and Final Judgment. (*McDaniel v. Paty, et al.*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed 443 (1978)). The Respondents respectfully submit that there was no finding by this Court that the Petitioner's Fourteenth and Fifteenth Amendment rights had been violated, as proscribed by 42 U.S.C. § 1983, which would provide a basis for the award of attorneys' fees under 42 U.S.C. §§ 1988 and 1973 1 (e), respectively.

The effect of this Court's opinion in the Petitioner's original appeal is that Article IX, § 1, of the Constitution of Tennessee, denying him the right to sit as a Delegate to the Tennessee Constitutional Convention in 1977, was an infringement of his fundamental right for the "free exercise of religion." as protected by the First Amendment to the Constitution of the United States. Only one of the Justices, Mr. Justice Stewart, made any reference at all to a possible chilling effect on any citizen's voting rights, as protected by the Fourteenth Amendment to the Constitution of the United States.

When the Petitioner sought the office of Delegate to the 1977 Constitutional Convention, he was exercising a right incident to State citizenship, and not one incident to federal rights that carry over to citizens of the various states. In construing the rights of citizens with reference to citizenship and the right to

hold public office, this Court has further said in the case of *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944) that

The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to State citizenship and derived solely from the relationship of the citizen and his State established by State laws. [Cases cited are omitted].

* * *

More than forty years ago this Court determined that an unlawful denial by State action of a right to State political office is not a denial of a right of property or of liberty secured by the due process clause. *Taylor and Marshall v. Beckham*, 178 U.S. 548, 20 S.Ct. 1009, 44 L.Ed. 1187. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion. *Cane v. State of Missouri ex rel. Newell*, 246 U.S. 650, 38 S.Ct. 334, 62 L.Ed. 921 [1918], as we reaffirm it now.

In this case now before this Honorable Court, the Complaint was filed under the provisions of T.C.A. §§ 23-1101, *et seq.*, the Tennessee Declaratory Judgment Act, for the legal determination of whether the Rev. McDaniel could serve in the 1977 Limited Constitutional Convention. Even though the Tennessee Supreme Court had ruled against him through the normal judicial process, *Paty v. McDaniel*, 547 S.W.2d 897 (1977), the Petitioner, by virtue of the stay granted by Mr. Justice Stewart, took the Oath of Office as a Delegate to the Constitutional Convention from his home district, from which he was elected in 1976, and served and took an active part in the Convention until it adjourned *sine die*. See: *Wilds v. Coggins*, 496 S.W.2d 460 (Tenn. 1974), and the *Journal of the Limited Constitutional Convention of 1977*.

2. **Citizens For Court Modernization, Inc.
and John S. Gannon v. Paty, et al.**

In their Jurisdictional Statement, the Petitioners assert that the Tennessee Courts should have taken jurisdiction of this case under 42 U.S.C. §§ 1983, and should have awarded a reasonable attorney's fee, as provided in 42 U.S.C. §§ 1973 *1* (e) and 1988. The Respondents respectfully submit to this Honorable Court that there was no error on the part of the Court of Appeals when it refused to reverse the Chancellor for failure to award the Petitioner any attorney's fee under 42 U.S.C. §§ 1973 *1* (e) and 1988.

As in the *McDaniel v. Paty, supra*, case, these Petitioners sought a legal determination of their legal rights under the provisions of the Tennessee Declaratory Judgment Act, T.C.A. § 23-1101, *et seq.* as to whether they could solicit the views of their members, and whether they wanted to set up a separate fund to support or oppose a proposed constitutional amendment affecting the Tennessee judicial system, and not violate the provisions of T.C.A. §§ 2-1932, *et seq.*, pertaining to the use of corporate funds.

After the Attorney General of the State conceded that these petitioners had a legal right to obtain the views of their members without violating T.C.A. § 2-1932, the trial court during a short hearing made the understanding a matter of record, and there was no appeal from that determination.

In view of this finding and the rule of law established by this action, the Respondents respectfully submit that, as in the *McDaniel v. Paty, supra*, case there has been no violation of the Petitioner's constitutional rights, or those protected by 42 U.S.C. 1983.

The Award of Attorney's Fees

In view of the fact that only persons who have been deprived of their individual civil rights may seek redress of such rights, there is no basis for the Petitioners to recover any attorney's fees. *Palmer v. Thompson*, 391 F.2d 324, and on rehearing 419 F.2d 1222 (C.A. Miss.); affirmed with opinion, 403 U.S. 127, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971) and *Green Street Association v. Daily*, 373 F.2d 1 (C.A. Ill.), cert. den. 387 U.S. 932, 87 S.Ct. 2054, 18 L.Ed.2d 995 (1967). See also *Powell v. Power*, 436 F.2d 84 (C.A.N.Y. 1970).

If the Petitioners have any claim that they have been deprived of any right under the Civil Rights Acts, they must show that some action was taken that would have deprived them of a constitutional right under color of a State Law. *Orr v. Trinter*, 444 F.2d 128 (6th Cir. 1971), cert. denied 408 U.S. 934, 92 S.Ct. 2847, 33 L.Ed.2d 767 (1972). See also: *Sullivan v. Brown*, 544 F.2d 279 (6th Cir. 1976). The United States Sixth Circuit Court of Appeals has recently stated in the case of *Craft v. Memphis Light, Gas and Water Division*, 534 F.2d 684 (1976), that

[T]he Fourteenth Amendment requires due process only if "State action" is "depriv[ing] any person of life, liberty or property." See, e.g. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 735-36, 42 L.Ed. 725, 735 (1975); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 357, 95 S.Ct. 449, 453-57, 42 L.Ed.2d 477, 483 (1974).

It is respectfully submitted that the facts and circumstances involved in these cases do *not* warrant the award of any attorney fees under the Civil Rights Acts. As previously stated, the records in these cases (1) show that the actions were brought under the Declaratory Judgment Act of Tennessee, T.C.A. §§ 23-1101, *et seq.*, for a legal determination of their prospective legal rights, and (2) do not show that any of the civil rights of the Petitioners have been violated. The final results of the litiga-

tion were that Rev. McDaniel's rights to serve in the 1977 Limited Constitutional Convention were determined without any possible civil rights being violated, and that the Citizens for Court Modernization, Inc., could obtain the views of its members without violating any penal law. The propriety of this procedure was carefully considered and approved by the Court in the case of *McKnight v. Southeastern Pennsylvania Transportation Authority*, 438 F.Supp. 822 (E.D. Penn. 1977).

The Petitioners, Citizens For Court Modernization and John S. Gannon, have further asserted that they were vindicated in its claim for the right to expend corporate funds to contact its members to obtain their views on the political issue submitted to the voters for their consideration on March 7, 1978, by the recent case of *First National Bank of Boston v. Bellotti, etc., et al.*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). The Respondents respectfully submit that this case does not apply to the Petitioner's case for attorneys' fees for the reason that before the time that the *Bellotti* decision was announced, the Petitioner already had the decision that it wanted from the Chancellor on February 24, 1978.

The Petitioners have cited the case of *Hutto v. Finney, et al.*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), as authority for an equity court to award attorney's fees to a successful litigant in a civil rights case. The Respondents take no exceptions to this point, but submits that it must be applied only to such appropriate cases as would warrant such an award. In the *Hutto* case, the Federal Courts found that correction officials in Arkansas *had acted in bad faith* in their failure to correct constitutional violations of prisoners' rights, and held that the award of attorneys' fees by an equity court was proper, citing *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 258-259, 95 S.Ct. 1612, 1622, 42 L.Ed.2d 141 (1975) and other cases, and the fact that [t]he award vindicated judicial authority without resort to the more drastic sanctions available for contempt of court and makes the prevailing party whole for ex-

penses caused by his opponent's obstinacy." Footnote No. 14, (98 S.Ct. 2565, at 2573). There is absolutely no evidence of any bad faith on the part of the Respondents in these cases to use as any basis for the award of any attorneys' fees under the Civil Rights Acts.

During its last term, this Court made three decisions that have a bearing on the Petitioners' claims in these cases. In the case of *State of California v. California & Hawaiian Sugar Co.*, 588 F.2d 1270 (1979), the Ninth Circuit Court held that since the cause of action arose under the laws of the State of California, and not the Federal Civil Rights Acts, there was no basis for awarding attorneys' fees under the provisions of 42 U.S.C. 1973 I (e), 1983, and 1988. On appeal this Court denied certiorari. _____ U.S. _____, 99 S.Ct. 2052, 60 L.Ed.2d 660 (April 30, 1979). In the case of *Chapman v. Houston Welfare Rights Organization*, _____ U.S. _____, 99 S.Ct. 1905, 1915-16, 60 L.Ed.2d 508 (May 14, 1979), Mr. Justice Stevens, speaking for the Court, held that

We cannot accept claimants' argument that we should reach this result by holding that § 1983 is an act of Congress "providing for equal rights" within the meaning of § 1343(3). Unlike the 1866 and 1870 Acts," § 1 of the Civil Rights Act of 1861 did not provide for any substantive rights—equal or otherwise. As introduced and enacted, it served only to ensure that an individual had a cause of action for violations of the Constitution, which in the Fourteenth Amendment embodied and extended to all individuals as against state action the substantive protections afforded by § 1 of the 1866 Act.³⁴ No matter how broad the §1 cause of action may be, the breadth of its coverage does not alter its procedural character. Even if petitioners are correct in asserting that § 1983 provides a cause of action for all federal statutory claims, it remains true that one cannot go into court and claim a "violation of § 1983" - for § 1983 by itself does not protect anyone against

anything. As Senator Edmunds recognized in the 1871 debate, "All civil suits, as every lawyer understands, which this act authorizes, are not based upon it; they are based upon the right of the citizen. The act only gives a remedy."³⁵

* * *

We reach a similar conclusion with respect to the argument that § 1983 is a statute "providing for the protection of civil rights, including the right to vote." Standing alone, § 1983 clearly provides no protection for civil rights since, as we have just concluded, § 1983 does not provide any substantive rights at all. To be sure, it may be argued that § 1983 does in some sense "provid[e] for the protection of civil rights" when it authorizes a cause of action based on the deprivation of civil rights guaranteed by other acts of Congress. But in such cases, there is no question as to jurisdiction, and no need to invoke § 1983 to meet the "civil rights" requirements of § 1343(4); the act of Congress which is the actual substantive basis of the suit clearly suffices to meet the requisite test.³⁶ It is only when the underlying statute is *not* a civil rights act that § 1983 need be invoked by those in claimants' position to support jurisdiction. And in such cases, by hypothesis, § 1983 does not "provid[e] for the protection of civil rights." (Footnote citations have been omitted).

In the third case, *Baker v. McCollan*, _____ U.S. _____, 99 S.Ct. 1689, 61 L.Ed.2d 433, (1979) this Court again held, in a case involving a tortious false imprisonment by a State official [Sheriff], that

Having been deprived of no rights secured under the United States Constitution, respondent had no claim cognizable under § 1983.

CONCLUSION

A private litigant in the State of Tennessee is ordinarily liable for his own attorneys' fees unless there is a fiduciary relationship involved in the action, or there is a statutory basis for the award of attorneys' fees.

The Federal Civil Rights Acts provide a means whereby a person whose Federal Constitutional Rights have been violated may use the Courts to enforce those rights, but those Acts provide no substantive rights. The record of these cases show that no constitutional rights of the Petitioners were violated, and, therefore, there is no basis for the award of any attorneys' fees. Even if it is assumed that the Federal Civil Rights Acts contain any substantive provision of law that could have been violated, there is no evidence of bad faith on the part of the Respondents that would enable the Petitioners to recover any attorneys' fees under the Federal Civil Rights Acts.

For all of the reasons as stated in this Response to the Petitioners' Petition for a Writ of Certiorari, the Respondents respectfully submit that this Honorable Court should refuse to review this case any further, and should deny the Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

TENNESSEE SUPREME COURT RULES

Rule 31

Publication of Opinions—Citation of Unpublished Opinions Prohibited.—1. The clerks of this Court will promptly record the written opinions delivered by the Court, and they shall not suffer them to be taken from their offices until they are recorded. A copy of the opinions, ordered to be published, shall be delivered to the Attorney General and Reporter as soon as enrolled.

2. The standards for determining whether opinions of the Supreme Court shall be designated for publication are:

a. The opinion establishes a new rule of law or alters or modifies an existing rule; or

b. The opinion involves a legal issue of continuing public interest; or

c. The opinion criticizes existing law; or

d. The opinion resolves an apparent conflict of authority; or

e. The opinion updates, clarifies or distinguishes a principle of law.

3. Opinions of the Court shall be published only if the majority of the judges participating in the decision find that a standard for publication as set out above is satisfied. Concurring opinions shall be published only if the majority opinion is published. Dissenting opinions may be published along with the main opinion, if the dissenting judge determines that a standard for publication as set out above is satisfied. If the standards for publication as set out above are satisfied as to only a part of an opinion, only that part shall be published.

4. No opinion of the Court of Appeals or the Court of Criminal Appeals shall be published until after the time has expired for the filing of a petition for the writ of certiorari. If this Court grants the writ, or denies the writ of certiorari, concurring in result only, the opinion of the intermediate court shall not be published.

5. All opinions that are not found to satisfy a standard for publication as prescribed in paragraph two (2) shall be marked *Not Designated For Publication*. No opinion so designated shall be cited in any court unless a copy thereof shall be furnished to the court and to adversary counsel.